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Investigation
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MEMORANDUM

DATE: August 23, 2002

TO: Faryar Shirzad
Assistant Secretary for
Import Administration

FROM: Richard W. Moreland
Deputy Assistant Secretary, Group I
Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago

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Background

On February 8, 2002, the Department of Commerce ("the Department") published the preliminary determination in this investigation. See Preliminary Affirmative Countervailing Duty Determination and Preliminary Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 67 FR 6001 ("Preliminary Determination"). The "Analysis of Programs" and "Subsidies Valuation Information" sections below describe the subsidy programs and the methodologies used to calculate the benefits from these programs. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the "Analysis of Comments" section below, which also contains the Department's responses to the issues raised in the briefs. We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this investigation for which we received comments and rebuttal comments from parties:

Comment 1: Change-in-Ownership Methodology
Comment 2: Change-in-Ownership Same Person Analysis
Comment 3: Sale of Iron and Steel Company of Trinidad and Tobago's ("ISCOTT") Assets at Fair Market Value in an Arm's-Length Transaction
Comment 4: ISCOTT Debt Forgiveness

Comment 5: Equity Infusions into ISCOTT
Comment 6: Provision of Electricity
Comment 7: Petitioners' New Subsidy Allegation

Change in Ownership

On February 2, 2000, the U.S. Court of Appeals for the Federal Circuit ("CAFC") in Delverde Srl v. United States, 202 F.3d 1360, 1365 (Fed. Cir. 2000), reh'g granted in part (June 20, 2000) ("Delverde III"), rejected the Department's change-in-ownership methodology as explained in the General Issues Appendix of the Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37268-37269 (July 9, 1993). The CAFC held that "{the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act effective January 1, 1995 ("the Act")} does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically 'passed through' to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from a government." Delverde III, 202 F.3d at 1364.

Pursuant to the CAFC finding, the Department developed a new change-in-ownership methodology. This new methodology was first announced in a remand determination on December 4, 2000, and was also applied in Grain-Oriented Electrical Steel from Italy; Final Results of Countervailing Duty Administrative Review, 66 FR 2885 (January 12, 2001) (remanded on other grounds in Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States, 206 F.Supp. 2nd 1344 (Court of International Trade ("CIT") 2002), affd., Slip. Op. 2002-82 (CIT 2002) ("AST - GOES")). We have applied this methodology in analyzing the change in ownership in this final determination. See Comments 1 through 3, below.

The first step under this methodology is to determine whether the legal person (entity) to which the subsidies were given is, in fact, distinct from the legal person that produced the subject merchandise exported to the United States. If we determine the two persons are distinct, we then analyze whether a subsidy has been provided to the purchasing entity as a result of the change-in-ownership transaction. If we find, however, that the original subsidy recipient and the current producer/exporter are the same person, then that person benefits from the original subsidies, and its exports are subject to countervailing duties to offset those subsidies. In other words, we will determine that a "financial contribution" and a "benefit" have been received by the "person" under investigation. Assuming that the original subsidy has not been fully amortized under the Department's normal allocation methodology as of the period of investigation ("POI"),[1] the Department would then continue to countervail the remaining benefits of that subsidy.

[1]The POI in this investigation is calendar year 2000.

In making the "person" determination, where appropriate and applicable, we analyze factors such as (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise, as may be indicated, for example, by use of the same name, (2) continuity of production facilities, (3) continuity of assets and liabilities, and (4) retention of personnel. No single factor will necessarily provide a dispositive indication of any change in the entity under analysis. Instead, the Department will generally consider the post-sale person to be the same person as the pre-sale person if, based on the totality of the factors considered, we determine the entity in question can be considered a continuous business entity because it was operated in substantially the same manner before and after the change in ownership.

Our analysis of the change in ownership in this proceeding is included in Comments 1 through 3 in the "Analysis of Comments" section, below.

Subsidies Valuation Information

Allocation Period

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the average useful life ("AUL") of the renewable physical assets used to produce the subject merchandise. Section 351.524(d)(2) of the Department's regulations creates a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System ("IRS Tables"). For carbon and certain alloy steel wire rod ("wire rod" or "subject merchandise"), the IRS Tables prescribe an AUL of 15 years. Neither Caribbean Ispat Limited ("CIL"), the sole respondent company in this proceeding, nor any other interested party disputed this allocation period. Therefore, we have used the 15-year allocation period for CIL. This is the same AUL period used for CIL in the Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Trinidad and Tobago, 62 FR 55003, 55005 (October 22, 1997) ("1997 Trinidad and Tobago Wire Rod").

Analysis of Programs

I. Programs Determined To Be Not Countervailable

A. Equity Infusions into ISCOTT

In 1978, ISCOTT and the Government of Trinidad and Tobago ("GOTT") entered into a Completion and Cash Deficiency Agreement ("CCDA") with several private commercial banks in order to obtain a part of the financing needed for construction of ISCOTT's plant. Under the terms of the CCDA, the GOTT was obligated to (1) provide certain equity financing toward completion of construction of ISCOTT's plant, (2) cover loan payments to the extent not paid by

ISCOTT, and (3) provide cash as necessary to enable ISCOTT to meet its current liabilities. The GOTT provided shareholder advances to ISCOTT pursuant to the CCDA each year from 1986 (the beginning of the AUL period in the instant investigation) through 1993.

In the Preliminary Determination, consistent with our findings in 1997 Trinidad and Tobago Wire Rod, we found that the shareholder advances provided by the GOTT to ISCOTT from 1986 through 1991 were countervailable subsidies within the meaning of section 771(5) of the Act. We determined that these equity infusions were a direct transfer of funds under section 771(5)(D)(i) of the Act that confer a benefit pursuant to section 771(5)(E)(i) of the Act because these investments were not consistent with the usual investment practice of private investors. We also determined that these investments were specific within the meaning of section 771(5A) of the Act because they were limited to ISCOTT.

As discussed in Comments 1 through 3 of the "Analysis of Comments" section, below, our change-in-ownership analysis shows that the person to whom the shareholder advances were given, ISCOTT, is not the same person as the respondent, CIL. Moreover, we have found that no subsidy was provided to CIL as part of the change-in-ownership transaction. Therefore, we determine that no financial contribution or benefit has been provided to CIL as a result of these shareholder advances.

B. Debt Forgiveness Provided in Conjunction With CIL's Purchase of ISCOTT

In December 1994, CIL exercised the purchase option in the plant lease agreement and purchased the assets of ISCOTT. After the sale of its assets, ISCOTT became a shell company with liabilities exceeding its assets. CIL, on the other hand, acquired most of ISCOTT's productive assets but none of its liabilities.

Regarding the liabilities remaining with ISCOTT, in 1995, the National Gas Company of Trinidad and Tobago Limited ("NGC"), which was owned by the GOTT, and the National Energy Corporation of Trinidad and Tobago Limited, a wholly owned subsidiary of NGC, wrote off amounts owed to them by ISCOTT totaling Trinidad and Tobago dollars ("TT$") 77,225,775. Similarly, Trinidad and Tobago National Oil Company Limited ("TRINTOC"), also owned by the GOTT, wrote off debts owed by ISCOTT totaling TT$ 10,492,830 as bad debt.

In the Preliminary Determination, consistent with our findings in 1997 Trinidad and Tobago Wire Rod, we found that this debt forgiveness provided by the GOTT to ISCOTT at the time of the change in ownership was a countervailable subsidy within the meaning of section 771(5) of the Act. We determined that this debt forgiveness was a direct transfer of funds pursuant to section 771(5)(D)(i) with the benefit being the amount of the debt forgiveness pursuant to section 771(5)(E). We also found this transaction to be specific within the meaning of section 771(5A) of the Act because it was limited to one company, ISCOTT.

As discussed in Comments 1 through 3 of the "Analysis of Comments" section, below, our change-in-ownership analysis shows that the person to whom this debt forgiveness was given, ISCOTT, is not the same person as the respondent, CIL. Moreover, we have found that no subsidy was provided to CIL as part of the change-in-ownership transaction. Therefore, we determine that no financial contribution or benefit has been provided to CIL as a result of this debt forgiveness.

C. Provision of Electricity

The Trinidad and Tobago Electric Commission ("T&TEC"), which is wholly owned by the GOTT, is solely responsible for the transmission, distribution, and sale of electric power in Trinidad and Tobago. The sole generators of electric power in Trinidad and Tobago are the Power Generating Company of Trinidad and Tobago ("PowerGen") and InnCogen, Limited ("Incogen"). Prior to December 23, 1994, T&TEC generated the power that it sold, but on and after this date, T&TEC divested its power-generating assets to PowerGen, which is owned 51 percent by T&TEC, 39 percent by Southern Electric International Trinidad Inc., and 10 percent by Amoco Power Resources Corporation.

For billing purposes, T&TEC classifies electricity consumers into one of the following categories: residential, commercial, industrial, and street lighting. Industrial users are further classified into one of four categories depending on the voltage at which they take power and the size of the load taken. Under T&TEC's customer categories, CIL is classified as a Rate E (Heavy Industrial - Very Large Load) user.

T&TEC's rates and tariffs for the sale of electricity are set by the Public Utilities Commission ("PUC"), an independent authority. In setting electricity rates, the PUC reviews cost of service studies done by T&TEC. Public hearings are held and views expressed orally and in writing. After considering all of the views and studies submitted, the PUC issues detailed orders with the new rates and explanations of how they were calculated. In establishing these rates, the PUC is required by section 32 of the Public Utilities Act to ensure that the new rates will cover costs and expenses and allow for a return. Additionally, section 32 of the Public Utilities Act sets out the guidelines the PUC is to follow in determining the extent of utility rate increases.

The rates in effect during the POI for all rate classes, except Rate D3 (Heavy Industrial - Large Load) and Rate E (Heavy Industrial - Very Large Load), were published in PUC Order No. 80 in October 1992. In July 1998, the electricity rates for industrial users D3 and E were increased by PUC Order No. 85 and were applied retroactively to six months before the date of T&TEC's application, i.e., to January 11, 1997. These electricity rates were based on the Cost of Service Study for 1996 and a formal claim filed by T&TEC requesting an increase in the rates and charges payable by industrial consumers.

As noted above, T&TEC is the only supplier of electricity in Trinidad and Tobago. Consequently, there are no competitively-set, private benchmark prices in Trinidad and Tobago

to use in determining whether T&TEC is receiving adequate remuneration within the meaning of section 771(5)(E) of the Act. Lacking such benchmarks, and consistent with 1997 Trinidad and Tobago Wire Rod, the only basis we have for determining what constitutes adequate remuneration are T&TEC's costs and revenues.

In 1997 Trinidad and Tobago Wire Rod, the Department found that, despite the PUC's mandate to set rates that will cover the costs of providing electricity plus an adequate return, past history indicated that this directive was seldom met. Moreover, the Department found that the evidence in the 1996 Cost of Service Study indicated that T&TEC did not receive adequate remuneration for that year on its sales of electricity to CIL's rate class. Consequently, in 1997 Trinidad and Tobago Wire Rod, the Department determined that, under section 771(5)(E) of the Act, the GOTT was bestowing a benefit on CIL through T&TEC's provision of electricity during the year of 1996. See 1997 Trinidad and Tobago Wire Rod, 62 FR at 55007.

In the current investigation, the GOTT provided in its questionnaire responses the T&TEC Cost of Service Studies for 1999 and 2000. These Cost of Service Studies indicate that T&TEC realized profits on its sales under the Rate E customer category. As noted above, in 1997 Trinidad and Tobago Wire Rod, we found this program to bestow a benefit because the 1996 Cost of Service Study indicated that T&TEC had incurred losses on its sales to CIL (Rate E). See 1997 Trinidad and Tobago Wire Rod, 62 FR at 55007. Consequently, as T&TEC earned a profit on the rate E customer category during the POI, we determine that the GOTT did not receive less than adequate remuneration under section 771(5)(E)(iv) of the Act for its provision of electricity to CIL. On this basis, we determine that the provision of electricity is not countervailable.

II. Programs Determined Not To Have Been Used

A. Export Allowance Under Act No. 14
B. Export Market Development Grants
C. Export Promotion Allowance
D. Corporate Tax Exemptions Under the Fiscal Incentives Act

Analysis of Comments

Comment 1: Change-in-Ownership Methodology

Respondents' Argument: The respondents first argue that the Department's "same person" methodology is illegal because it is indistinguishable from a per se rule that subsidies travel with productive assets, and it fails to account for the facts and circumstances surrounding an arm's-length sale of assets for fair market value. The respondents argue that the illegality of this methodology is supported by the numerous judicial opinions at the CIT which have held that the "same person" methodology is inconsistent with the holding of the CAFC in Delverde III.

The respondents also argue that, regardless of the fate of those CIT decisions and the "same person" methodology before the CAFC, the Department's own recent interpretation of Delverde III precludes a finding that subsidies allegedly bestowed on ISCOTT can be attributed to CIL. Specifically, according to the respondents, in three remand redeterminations issued by the Department since the Preliminary Determination, the Department has unambiguously interpreted Delverde III as prohibiting the "pass through" of subsidies in privatizations accomplished through the sale of assets as opposed to the sale of shares.[2] According to the respondents, the Department took the position in these remand redeterminations that the Delverde III reasoning is limited to asset transactions, and the Department interpreted Delverde III to mean that, where assets are sold by one company to another, any subsidy previously conferred upon the seller of those assets may not be attributed to the purchaser of those assets.

The respondents state that this interpretation of Delverde III is fully consistent with a plain reading of that opinion, in which the CAFC unambiguously held that the sale of assets for fair market value necessarily means that the purchaser of the assets "received no benefit from the prior owner's subsidies." Thus, according to the respondents, in the context of an arm's-length asset sale, there is no need to conduct a "same person" inquiry because the purchaser and seller of the assets are necessarily different legal persons. The respondents claim that the United States has been equally explicit in its statements to the World Trade Organization ("WTO") panel that an asset sale should not give rise to a continuation of liability for countervailing duties.

According to the respondents, because CIL's acquisition of ISCOTT's assets was an asset sale in which CIL purchased those assets for fair market value (see Comment 3, below), and because there have been no allegations nor evidence that CIL ever received any non-recurring subsidies, Delverde III requires a finding that CIL received neither a financial contribution nor a benefit from non-recurring subsidies allegedly conferred upon ISCOTT. The respondents contend that the fact that the Department might decide to appeal these recent remand redeterminations to the CAFC is irrelevant because the Department must apply controlling precedent of the CAFC in accordance with the interpretation of that precedent that the Department has adopted according to Independent Petroleum Assoc. of America v. Babbitt, 92 F.3d. 1248, 1260 & n.3 (D.C. Cir. 1996) (where the court held that "while free to refuse to acquiesce, the {agency} is not free to adopt {a judicial ruling} for some purposes but arbitrarily and capriciously reject it for others.").

Petitioners' Argument: The petitioners disagree with the respondents' argument that, because ISCOTT was sold in the form of an asset transaction, prior subsidies are no longer attributable to CIL. The petitioners state that Delverde III, the Department's remand redeterminations, and

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[2]See Allegheny Ludlum Corp v. United States, CIT No. 99-09-00566, Results of Redetermination Pursuant to Court Remand (June 3, 2002) ("Allegheny Remand II"), GTS Industries S.A. v United States, CIT No. 00-03-00118, Results of Redetermination Pursuant to Court Remand (June 3, 2002), and Acciai Speciali Terni S.p.A. v. United States, CIT No. 99-06-00364, Results of Redetermination Pursuant to Court Remand (June 3, 2002).

other relevant case law plainly establish that the asset form of the sale cannot be dispositive in the change-in-ownership analysis. The petitioners state that the Department has never articulated a rule that, in the case of an asset sale, a past subsidy can no longer be attributed to the company under investigation. The petitioners argue that the "fundamental difference" to which the Department is referring is not the "fundamental difference" between stock and asset sales, but whether or not the facts demonstrate that there is a difference in terms of the "same person" analysis. According to the petitioners, had the Department viewed Delverde III as premised on the asset versus stock distinction, it would have presumably devised a methodology on remand that focused on the form of the sale, and not whether the facts show that the same legal person exists on both sides of the transaction.

The petitioners also argue that Delverde III does not "unambiguously {hold} that the sale of assets for fair market value necessarily means that the purchaser of the assets 'received no benefit from the prior owner's subsidies'." The petitioners state that, in fact, Delverde III precludes such an automatic rule, and that the CAFC instead held that the "change in ownership provision simply prohibits a per se rule either way" and that this "provision does not direct Commerce to use any particular methodology for determining the existence of a subsidy in a change of ownership situation." See Delverde III, 202 F.3d at 1366. The petitioners state that the respondents are actually asking the Department to directly contravene the holding in Delverde III by establishing a rule.

The petitioners contend that the respondents' asset argument is tantamount to saying that the form of the sale is paramount to its substance. According to the petitioners, however, reviewing courts have expressly admonished that, in the context of privatizations, the Department must be careful not to elevate form over substance. (See, e.g., AST - GOES and British Steel v. United States, 924 F.Supp. 139 (CIT 1996).) Moreover, the petitioners argue that Congress, in adopting the change-in-ownership provision of the Act, indicated that, absent the statute's clarification that an arm's-length sale does not automatically extinguish prior subsidies, "some might argue that all that would be required to eliminate any countervailing duty liability would be to sell subsidized assets to an unrelated party." (See H.R. Rep. No. 103-826(1), at 110 (1994), reprinted in 1994 U.S.C.C.A.N. 3373, 3882.) According to the petitioners, by arguing that the sale of ISCOTT's assets, by itself, automatically erases the subsidies previously bestowed on the company, the respondents are perpetuating the same "extreme interpretation" that Congress expressly intended to avoid in adopting the statute.

Additionally, the petitioners state that the respondents have misconstrued the statements made by the United States to the WTO. According the petitioners, the Department has stated that assets are treated differently from stock sales only when the assets are sold to a different person (emphasis added by the petitioners). Thus, the petitioners state that the personhood analysis, not the form of the sale, controls the outcome of the change-in-ownership inquiry, and an asset sale does not necessarily pre-suppose a different "person." Moreover, the petitioners state that, in each of the passages quoted in the respondents' briefs, the United States refers expressly to the

sale of "bare assets," which the petitioners state refers to situations where assets are sold piecemeal, which is not applicable to the type of asset sale in this situation.

Finally, the petitioners state that the respondents offer another unlawful per se rule by claiming that, because ISCOTT was sold for fair market value in an arm's-length process, prior subsidies are no longer attributable to CIL. The petitioners argue that, as they have stated several times in the course of the investigation, record evidence shows that ISCOTT was not sold in a fair market value transaction arrived at through an arm's-length negotiating process (see Comment 3, below).

Department's Position: We disagree with the respondents that the Department's "same person" change-in-ownership methodology is not in accordance with law or in conformance with the CAFC's decision in Delverde III. In several recent cases, various judges of the CIT have ruled on the Department's "same person" test. Some found that this methodology was not in accordance with law and the cases were remanded to the Department for further proceedings: see Allegheny Ludlum 182 F. Supp. 2d 1357 (CIT 2002); GTS Industries S.A. v. United States, 182 F.Supp. 2d 1369 (CIT 2002); Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States, Slip Op. 2002-10 (CIT 2002); and ILVA Lamiere E Tubi S.R.L. and ILVA S.p.A v. United States, Slip Op. 2002-32 (CIT 2002). In another case, AST - GOES, the CIT affirmed the Department's "same person" methodology.

All of these cases, however, are subject to further appeal. Therefore, notwithstanding the respondents' arguments regarding the inappropriateness of our "same person" methodology, until there is a final and conclusive decision regarding the legality of the Department's change-in-ownership methodology, we have continued to apply it for purposes of this final determination.

We also disagree with the respondents that the Department's own recent interpretations of Delverde III, and Delverde III itself, preclude a finding that subsidies bestowed on ISCOTT can be attributed to CIL. First, the Department has never stated that Delverde III prohibits the "pass through" of subsidies in privatizations accomplished through the sale of assets as opposed to the sale of shares. In our remand redetermination pursuant to Delverde III, we stated that "the distinction between a sale of shares and a sale of assets is not crucial to the 'person' determination, despite Delverde's focus on it in its comments. It is not one of the factors that we examine. Rather, it becomes relevant principally to the extent that it helps to clarify the analysis of one of those factors, namely, the continuity of assets and liabilities." See Delverde, SrL v. United States, Consol. Court No. 96-08-01997, Final Results of Redetermination Pursuant to Court Remand (December 4, 2000). Nowhere in this or any of the Department's other recent remand redeterminations do we articulate that, where assets are sold by one company to another, any subsidy previously conferred upon the seller of those assets may automatically not be attributed to the purchaser of those assets. Moreover, the statements to which the respondents refer that were made to the WTO are not on point because they relate to the sale of "bare" assets, not the sale of an entire production unit as is the case in this situation. We note that U.S. law, as implemented in the Uruguay Round Agreements Act, is fully consistent with our WTO obligations.

Finally, contrary to the respondents' arguments, Delverde III specifically prohibits the Department from adopting any per se rule that a subsidy passes through, or is eliminated, as a result of a change in ownership. In fact, the CAFC instead held that the "change in ownership provision simply prohibits a per se rule either way" and that this "provision does not direct Commerce to use any particular methodology for determining the existence of a subsidy in a change of ownership situation." See Delverde III, 202 F.3d at 1366.

The Department's response to the arguments pertaining to fair market value is included below in Comment 3.

Comment 2: Change-in-Ownership Same Person Analysis

Respondents' Argument: The respondents argue that, even if the Department were to continue to unlawfully apply the "same person" methodology in this instance, verified record evidence and an unrebutted expert opinion demonstrate that there is no conceivable application of any principle of successor liability under which CIL might be considered the same person as ISCOTT.

The respondents contend that the privatization at issue in this case took place in two distinct phases, the lease of the plant assets by CIL from 1989 through 1994, and the sale of the plant assets to CIL in 1994 pursuant to the purchase option contained in the Plant Lease Agreement. The respondents state that the Department's methodology in the Preliminary Determination of comparing "the business entity that was owned by ISCOTT (but run by CIL) in 1994 prior to the change in ownership to the business entity owned by CIL after the change-in-ownership" is illogical. The respondents contend that it is undisputed that the person that received equity infusions from the GOTT was ISCOTT, and that the person that produced the POI subject merchandise was CIL. The respondents state that the facts on the record clearly show that ISCOTT was only a landlord and had no hand whatsoever in the plant's operations during the lease period. The respondents state that CIL, on the other hand, as part of a standard "lease-purchase" or "leveraged lease" agreement, had complete operational control of the plant.

According to the respondents, CIL was in no different position during the lease period than any other lessee of a capital asset, and the only "business entity" that it was running was its own, not a "business entity that was owned by ISCOTT" as the Department stated in the Preliminary Determination. Thus, the respondents argue that to assume that there was a single "business entity that was owned by ISCOTT (but run by CIL)" is to ignore the different corporate entities of ISCOTT and CIL and to assume that two distinct legal entities were the same by comparing CIL's operations to CIL's operations.

The respondents state that the only rational comparison in this instance in terms of the "same person" methodology is to compare ISCOTT's operations some time prior to the 1989 plant lease or prior to the sale of assets in 1994 to CIL's operations following the sale of the assets in 1994. In either comparison, the respondents contend that the Department could not find that CIL and

ISCOTT were the same person. The respondents argue that there was no continuity of business operations because CIL, after it assumed control of the plant during the lease in May 1989, immediately began to use its own name in its operations and sales, changed its customer base completely by 1995, shifted its sales markets drastically by 1995, shifted its product mix toward higher-value wire rod products, and undertook a major change in suppliers by 1995. The respondents state that there were major changes with respect to the retention of personnel because, upon taking control of the plant in 1989, CIL immediately replaced almost all of the management. As for continuity of assets and production facilities, the respondents argue that CIL invested hundreds of million of dollars in the plant facilities, both during the lease period and after the sale. Finally, CIL did not take over any ISCOTT liabilities at the time of the sale, which, the respondents argue, based on the Department's recent interpretations of Delverde III, would itself prohibit the pass-though of subsidies. Based on this evidence, the respondents state that CIL did nothing more than lease, then purchase, the assets of ISCOTT, and in no way was the same person as ISCOTT.

The respondents point out that the Department, in discussing its "same person" methodology, has continuously stated that the methodology is firmly grounded in the principles of corporate successorship that apply in the United States. Based on an analysis of U.S. principles of corporate successorship performed by an outside expert with respect to this proceeding (which the respondents contend has not been rebutted), the respondents state that this expert's opinion is that CIL would in no way be liable for ISCOTT's obligations either during the lease period or in the period following the sale of the plant's assets. Moreover, according to the respondents, this expert concluded that the Department's comparison of the "business entity that was owned by ISCOTT (but run by CIL)" in 1994 to CIL in 1995 has no basis in U.S. legal principles. Thus, the respondents state that there is no plausible application of any principle even remotely resembling U.S. doctrines of successor liability that would lead to the conclusion that CIL is a successor in liability to ISCOTT or that CIL is the same person as ISCOTT.

Finally, the respondents argue that, if the Department were to find that ISCOTT and CIL were the same person, it would clearly reveal that the "same person" methodology is, in fact, a per se methodology that violates the change-in-ownership provision in U.S. law and the holding of the CAFC in Delverde III. The respondents also contend that this would also belie the Department's contention that there is a "fundamental" difference between asset transactions and share transactions as discussed in the Department's recent remand redeterminations and at the WTO.

Petitioners' Argument: The petitioners argue that the Department's verification and record evidence confirm the Department's finding in the Preliminary Determination that CIL and ISCOTT were the same person and that any subsidies received by ISCOTT that remain outstanding during the POI should be attributed to CIL.

The petitioners first argue that the Department was correct in applying the "same person" test at the actual change in ownership instead of at the date of the lease takeover. The petitioners argue that applying the test to anything other than an official ownership change would distort its

purpose and create a dangerous loophole whereby respondents could argue that any event in a company's history could, in theory, result in the extinguishment of subsidies. Moreover, the petitioners state that U.S. law and reviewing courts (see, e.g., Delverde III) have made it clear that the "same person" methodology is only to be applied to the unique and complex facts raised by privatizations.

Additionally, the petitioners state that, even if the "same person" test were to be applied at the time of the lease takeover, the pre- and post-lease company would not be different persons. The petitioners state that, although the respondents make much of the investments CIL made in the plant following the lease take-over, the respondents are essentially asking the Department to create another loophole whereby any time a company is the beneficiary of a significant investment that returns it to profitability, it can no longer be considered the same person. The petitioners argue that the point of CIL's investments in the first place was to transform ISCOTT into a better wire rod producer (i.e., to allow the company to continue in the same business in a more successful manner). Thus, the petitioners state that CIL and ISCOTT were substantially the same entity before and after the 1989 lease.

The petitioners also state that, by urging the Department to examine ISCOTT instead of CIL's actual operations, the respondents are wrongly asking the Department to focus on the "owner" of the company. The petitioners state that the Department has made it very clear in the recent remand redeterminations that the change-in-ownership analysis is properly focused on the company (i.e., the entity producing the merchandise) rather than the owner. Citing to the Allegheny Remand II, the petitioners state that the Department stated expressly that the focus of the change-in-ownership inquiry is on the "producer" of the subject merchandise, and not the owners of that producer. The petitioners state that this is consistent with the Act, which instructs the Department to examine countervailable subsidies that are provided to "the manufacture, production, or export" of the subject merchandise. Moreover, the petitioners state that the courts have already rejected arguments that take the agency's focus away from the company that actually produces the subject merchandise in two separate appeals concerning Acciai Speciali Terni, S.p.A.

The petitioners contend that the respondents' analogy to a lease-purchase agreement is unpersuasive because that situation refers to a single discreet asset, whereas the situation at hand refers to the lease of a company's entire productive operations. The petitioner finally argues that, to the extent ISCOTT can be considered equivalent to a holding company, the Department's regulations at 19 CFR 351.525(b)(6)(iii) state that subsidies received by a non-producing holding company should be attributed to the producing subsidiary. Thus, the petitioners state that the respondents' request undermines the Department's well-established practice of attributing subsidies to the producing entity in a related group of companies.

The petitioners contend that, if the Department uses the correct comparison as it did in the Preliminary Determination, verification confirmed that very little changed with respect to the company's operations after the sale and that ISCOTT and CIL were the same person. The

petitioners state that CIL continued to manufacture the same product lines, with only a change in the overall product mix. The petitioners state that the expansion of the existing customer and supplier base was a natural response to a change in product mix. Moreover, the petitioners state that there was no notable change in the production facilities with the exception of upgrades that were a natural evolution in the company's business that could have occurred absent a change in ownership. As for assets and liabilities, the petitioners argue that, while it is true that CIL purchased only the assets of ISCOTT, the GOTT engineered the lease and the CCDA in a manner that allowed it to rid ISCOTT of its liabilities prior to the sale; thus, the fact that no liabilities transferred is not relevant to the analysis. Finally, with respect to the retention of personnel, the petitioners claim that verification confirmed that there were no major changes due to the change in ownership.

According to the petitioners, the respondents' argument for finding that ISCOTT and CIL are not the same person is an attempt to lower the threshold required to establish a "new" person. According to the petitioners, the Department has explained that the basic purpose of the "same person" inquiry is to determine whether anything "meaningful" has changed since the original bestowal of the subsidy. (See Final Results of Redetermination Pursuant to Court Remand in Allegheny Ludlum Corp v. United States, December 20, 2000.) Petitioners state that reviewing courts have also explained that "{i}f the commercial reality is a shared identity between pre- and post-privatization entity, Commerce may presume that the subsidy remains with the post-privatization entity absence to the contrary." (See AST - GOES.) According to petitioners, absent a significant discontinuity between the entities at issue, if the "commercial reality" is an overall similarity in the business operations of the company before and after the change in ownership, a "same person" finding is required. The petitioners state that the fact that changes have happened with a company over time to improve product quality, efficiency, and profitability does not necessarily mean that a company has been transformed into a "new" person.

Moreover, the petitioners argue that the respondents' own arguments with respect the change-in-ownership analysis are flawed and contradictory. For example, the petitioners state that, with respect to changes in suppliers, the respondents' analysis is flawed because CIL makes the comparison to its own 1989 supplier list, which would essentially be tantamount to CIL saying that it had become a new person itself based on the gradual change in its own supplier database. Moreover, the petitioners state that, with respect to the use of trade names, this matter is unimportant in this situation because product lines, according to the respondents themselves, are standard throughout the industry and "do not carry company-specific or branded designations." The petitioners state that the respondents' argument that discontinuity of business operations was the intended result of the lease is not true because the essence of the agreement was to continue to maintain wire rod production at the plant. Lastly, the petitioners contend that, as noted above, ISCOTT had few liabilities at the time of the sale based on actions taken by the GOTT. In sum, the petitioners argue that all of ISCOTT's assets were sold intact and production of identical merchandise continued at the facility without interruption despite the sale. Thus, the petitioners state this scenario suggests that a continuous business operation sufficient to support a "same person" finding.

Finally, with respect to the respondents' arguments relating to successor liability, the petitioners state that the Department has expressly stated that it was not adopting the precise successor liability test used in the corporate law context, a fact which the respondents recognize in their case brief. Moreover, the petitioners state that, in a countervailing duty proceeding, the Department is bound only by the statutory provisions controlling its analysis.

Department's Position: The change in ownership we are analyzing in this proceeding is unique with respect to any other change in ownership that we have faced since the introduction of our current change-in-ownership methodology. The courts have repeatedly instructed the Department that, in conducting change-in-ownership analyses, we must examine the particular facts and circumstances surrounding the change in ownership in order to determine whether the entity subject to the ongoing investigation itself, and not just the entity that originally received the subsidy, received a financial contribution and benefit, either directly or indirectly, from the government. See Delverde III. Thus, our examination in this instance necessarily must focus on whether CIL, the respondent company in this investigation, received a financial contribution or a benefit, either directly or indirectly, from the shareholder advances and debt forgiveness provided by the GOTT to ISCOTT.

By way of background, in the early to mid-1980s, due to ISCOTT's persistent financial problems and the GOTT's repeated shareholder advances into ISCOTT pursuant to the CCDA, the GOTT on several occasions sought outside assistance in terms of both management help and objective analysis to determine the best course of action for ISCOTT. ISCOTT received outside management assistance from several parties, including Hamburger Stahlwerke ("HSW"); HSW later submitted a proposal to the GOTT to lease the ISCOTT facilities. Additionally, several outside studies focused on the need for ISCOTT and the GOTT to take steps to improve ISCOTT's operations and the management of ISCOTT. For example, an August 27, 1987 International Finance Corporation ("IFC") report analyzed ISCOTT's position at the time and its future prospects, and concluded that several options, such as leasing the plant to an outside party such as HSW (based on an examination of HSW's lease proposal), were possible to make ISCOTT's operations viable. The IFC report stated that the lease of the ISCOTT plant was the best option for making ISCOTT operationally sound.

Based on the recommendations of the IFC, the GOTT formed an outside committee to negotiate a lease for ISCOTT. Both this committee and another outside committee created to review the findings of the first committee agreed with the IFC study that leasing the ISCOTT property was the preferred option to make ISCOTT viable. Thus, the GOTT proceeded to negotiate a lease with HSW based on its earlier lease proposal that had been examined and approved by the IFC. Although an agreement was reached with HSW in August 1988, HSW withdrew its proposal in September 1988. In October 1988, Pt. Ispat Indo ("Ispat") approached the GOTT with a proposal similar to the HSW proposal. This proposal was also endorsed by the IFC. On April 8, 1989, the GOTT and CIL, which Ispat had created for the purpose of operating the leased facilities, signed an agreement to lease ISCOTT's assets. This lease agreement took effect on May 1, 1989. According to the terms of the lease agreement, CIL had an option to formally purchase

ISCOTT's assets at any time after the fifth year of the lease. In March 1994, CIL notified the GOTT of its intention to exercise this option. The formal transfer of assets was concluded in December 1994 upon approval by the GOTT.

Under our change-in-ownership methodology, we must determine whether the legal person (entity) to which the subsidies were given is, in fact, distinct from the legal person that produced the subject merchandise exported to the United States. To determine whether CIL and ISCOTT are distinct persons, our methodology stipulates that we examine the four factors discussed above in the "Change In Ownership" section. We will generally consider the post-change person to be the same person as the pre-change person if, based on the totality of the factors considered, we determine that there was a continuous business entity that was operated in substantially the same manner before and after the change.

In examining the facts in the instant proceeding, it is undisputed that ISCOTT was the entity that received the shareholder advances and debt forgiveness from the GOTT that are being examined in this investigation. What is not clear, however, is whether CIL, the respondent in this investigation, itself received a financial contribution or a benefit from those transactions.

As noted above, this case is unique with respect to other changes in ownership we have examined under our new methodology in that the change in ownership was not an isolated event, but in essence a series of events beginning with the implementation of the lease on May 1, 1989, and concluding with the formal transfer of assets from ISCOTT to CIL on December 30, 1994. From the time that CIL first leased the assets in question, record evidence indicates that CIL—not ISCOTT—had operational control of the assets. See August 23, 2002, memorandum to Faryar Shirzad, "CIL-ISCOTT Change In Ownership Analysis" ("Change in Ownership Memorandum"), which is on file in the Department's Central Records Unit in Room B-099 of the main Department building ("CRU"). Moreover, because the lease included a purchase option clause, CIL was able to make more significant changes to the ISCOTT-owned assets during the lease period, knowing that it would eventually have the option to purchase the assets and continue operations on its own should it deem the changes to be advantageous to it.

Based on this unique fact pattern, it is appropriate in this instance to examine changes that were made to the operations of the CIL-run facilities as early as the implementation of the lease to determine whether ISCOTT, the recipient of the subsidies, and CIL, the respondent company and the operator of ISCOTT's assets during the lease period, are the same legal person.

Therefore, we first examined the differences between ISCOTT immediately prior to the lease implementation in 1989 and the entity run by CIL immediately subsequent to the lease in 1989 that were due directly to the lease. Because most of this information is proprietary, the details of the analysis are discussed in the Change in Ownership Memorandum. Based on our analysis in the Change In Ownership Memorandum, we find that pre-lease ISCOTT is not the same person as the entity run by CIL subsequent to the lease. Record information indicates that no subsequent changes to CIL's operations that were caused by the change in ownership itself would alter this

fact pattern and finding that ISCOTT and the entity run by CIL subsequent to the lease were not the same person. Thus, CIL, the producer of the subject merchandise during the POI, received neither a financial contribution nor a benefit from the subsidies provided to ISCOTT.

Because we have determined that the legal person (entity) to which the subsidies were given is, in fact, distinct from the legal person that produced the subject merchandise exported to the United States, as discussed above in the "Change in Ownership" section, we next analyze whether a subsidy has been provided to the purchasing entity (CIL) as a result of the change-in-ownership transaction. Our analysis with respect to this issue is contained below in Comment 3.

Comment 3: Sale of ISCOTT's Assets at Fair Market Value in an Arm's-Length Transaction

Petitioners' Argument: The petitioners contend that the Department cannot conclude that ISCOTT's assets were sold to CIL in an arm's-length process for fair market value. The petitioners first argue that the unique relationship between ISCOTT and CIL due to the lease arrangement shows that the parties were not dealing at arm's-length.

The petitioners secondly argue that the sale did not occur at fair market value. According to the petitioners, the record shows that the plant's assets were sold for a price that was significantly less than fair market value because the assets were sold for less than their book value. The petitioners also argue that the competitive conditions that normally accompany a fair market value transaction were absent in this transaction. The petitioners contend that, because only one bidder was ever considered due to the lease purchase option, other potential purchasers were "shut out of the process from the outset," and that it was clear that CIL would be the likely buyer all along. The petitioners state that this contradicts the Department's statements in the Allegheny Remand II that "the existence of an open selling process that resulted in numerous bidders submitting offers. . .would provide the best indication that full value had been paid for the company." Moreover, the petitioners stated that the appraisal process was not objective because the parties provided significant input into the analysis and could comment on each others submitted information.

The petitioners contend that the respondents' claim that the assets were sold at fair market value because the sales price was derived through an independent evaluation process misses the fact that the existence of an independent evaluation is not the sole factor controlling the process, and that other factors in this transaction potentially influenced the sale.

Respondents' Argument: The respondents argue that the verified facts on the record prove that both the lease and subsequent sale of ISCOTT's assets to CIL were accomplished through arm's-length transactions for fair market value. With respect to the plant lease, the respondents contend that, prior to the lease, the GOTT evaluated proposals from several independent bidders and conducted extensive financial studies of the terms and conditions of the proposed leases. Moreover, the respondents state that the GOTT actively negotiated with two separate parties in securing the best lease from its standpoint for its ISCOTT facilities. As for the sale, the

respondents argue that CIL opted to purchase the assets according to the terms of the original lease agreement which provided CIL with the option of purchasing ISCOTT's assets at any time after the fifth year of the lease term. The respondents stated that, pursuant to the lease agreement, the sales price was set by an independent outside valuer agreed to by all parties.

The respondents contend that the petitioners' argument that ISCOTT and CIL did not deal with one another in an arm's-length manner is unsubstantiated. The respondents state that there is nothing "unique" about the relationship between a lessee and a lessor that would suggest that the dealings between the two parties are anything other than arm's length. Moreover, the respondents state that record evidence shows that the relationship was arm's length, and that the petitioners have not pointed to any record evidence that would show otherwise. The respondents state that the petitioners' allegation that the sale of the assets was for less than fair market value is equally baseless, and that there is no correlation between the book value of an asset and its fair market value. The respondents also state that there is a detailed description on the record of the valuation process that took place, and the petitioners have not alleged that there was anything deficient in this process.

Department's Position: We disagree that ISCOTT's assets were not sold in an arm's-length transaction at fair market value. First, with respect to the sale being made at arm's length, the petitioner has provided nothing more than speculation in alleging that the transaction was not made at arm's length. The fact that CIL leased assets from ISCOTT is not dispositive, in and of itself, in determining that the sale was not made at arm's-length. Non-related parties engage in lessor-lessee relationships in numerous business transactions in the course of normal business, and there is nothing inherent to these kinds of relationships that would suggest that the relationship itself is not conducted on an arm's length basis. Moreover, it is clear from the lease agreement that ISCOTT had no say in the way CIL operated ISCOTT's assets on a day-to-day basis. Finally, the lease itself offered no indication that the relationship was anything other than arm's length. See Change In Ownership Memorandum.

There is also no information on the record that would suggest that either the lease or the sale of ISCOTT's assets was conducted on anything other than a fair market basis. Regarding the lease, as discussed above in Comment 2, prior to entering into the lease with CIL, the GOTT had numerous outside studies conducted to determine the best course for the future of ISCOTT. As discussed above in Comment 2, these studies all concluded that the best option for ISCOTT would be the lease of its assets to an outside party. The recommendation of the IFC study was itself based on the examination of at least one of the several outside lease proposals that were made. ISCOTT and the GOTT negotiated with two separate outside parties before finally agreeing to the lease with CIL. Moreover, the final lease was endorsed by the IFC, an outside analyst. None of these actions indicate that the lease was negotiated on anything other than a fair market basis.

As for the sales transaction, as discussed above, the lease to CIL included a purchase option clause that allowed CIL to purchase ISCOTT's assets any time after the fifth year of the lease. The lease stipulated that the sales price of the assets would be determined by an independent

outside valuer who would have to be agreed upon by all parties involved. The only deductions to the value of the assets established by the independent outside valuer was for capital improvements already made by CIL as stipulated in the lease agreement. The sale of the plant assets was made based on the independent valuer's recommendations and was pursuant to the lease agreement. There has been no allegation, and there is no information that would lead us to believe, that this independent valuation was not done on a fair market basis. Moreover, although the petitioners argue that the sale was not at fair market value because the sales price was less than the book value of the assets, there is not necessarily a correlation between the book value of assets and the value of the assets on the open market, a fact that the petitioners themselves acknowledge in their case brief. Thus, there is no reason to believe that the sale of the plant's assets was conducted on anything other than a fair market basis and that the sale was not at fair market value. Therefore, we find that no subsidy was provided to CIL as a result of the change-in-ownership transaction.

Comment 4: ISCOTT Debt Forgiveness

Respondents' Argument: The respondents argue that the Department should conclude that none of the alleged subsidies bestowed upon ISCOTT, including the forgiveness of ISCOTT's debts, can be attributed to CIL. The respondents state that the facts and circumstances surrounding the sale of ISCOTT's assets to CIL, and the debt forgiveness that followed, only serve to confirm that there is a fundamental difference between share and asset transactions. According to the respondents, because CIL purchased only ISCOTT's plant assets, it is absurd to attribute the NGC and TRINTOC debts that were written off several months after the sale to CIL. Moreover, if CIL had assumed the NGC and TRINTOC debt obligations, according to the respondents, it would have paid less for the plant assets proportionate to those debt amounts.

According to the respondents, the effect of the "same person" methodology means that, if the Department determines that CIL is the same person as ISCOTT, CIL would be liable for the full amount of the debt forgiveness. Thus, if CIL had assumed the liabilities and paid a lower price for CIL in doing so, no debt forgiveness would have occurred at all; instead, CIL paid a larger amount for an asset which did not include liabilities, and still faces the imposition of countervailing duties on the assumption that it did assume those liabilities. According to the respondents, this is the perfect illustration of why, in the context of an arm's-length transaction for the sale of assets, the Department must examine the facts surrounding the transaction to determine whether the purchaser of the assets received a financial contribution and a benefit.

Petitioners' Argument: The petitioners argue that, at verification, GOTT officials indicated that the facts regarding this program from 1997 Trinidad and Tobago Wire Rod were accurate and submitted no new information with respect to this transaction. Thus, the petitioners state that the facts underlying the Department's countervailability findings from 1997 Trinidad and Tobago Wire Rod and the Preliminary Determination have not changed and have been verified twice. Therefore, the petitioners argue that the Department should continue to treat this debt forgiveness as a countervailable subsidy. (See, e.g., AST - GOES and Final Affirmative Countervailing Duty

Determination: Structural Steel Beams from the Republic of Korea, 65 FR 41051 (July 3, 2000) ("Structural Beams from Korea").)

The petitioners contend that the respondents' arguments that the Department wrongly attributed to CIL the debt forgiveness provided in conjunction with the sale are flawed. First, the petitioners argue that, because the Department determined in 1997 Trinidad and Tobago Wire Rod that the debt forgiveness was a "new" subsidy directly attributable to CIL and not to ISCOTT, there was no need to assess whether a change in ownership had any impact on the Department's ability to "attribute" that benefit to CIL.

The petitioners secondly argue that, contrary to the respondents' arguments, it was correct to countervail the debt forgiveness to CIL pursuant to the Department's practice. The petitioners note that the Department routinely finds that debt forgiveness provided in conjunction with the sale of a government-owned company is a countervailable subsidy benefitting the company that currently produces the subject merchandise. (See, e.g., Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy, 64 FR 15508, 15512 (March 31, 1999).) The petitioners state that this principle was also upheld in Delverde III. Moreover, the petitioners state that record evidence strongly suggests that the write-off of ISCOTT's debts was a quid pro quo for the sale.

The petitioners point out that the Department found these same arguments unpersuasive in 1997 Trinidad and Tobago Wire Rod. In that case, according to the petitioners, the Department stated in response to the respondents' argument that the purchase price for ISCOTT was higher because CIL did not assume any of ISCOTT's liabilities that "{i}n the end, a "bubble of subsidies would remain with a virtually empty corporate shell which would not be affected by any countervailing duties because it did not produce or export the countervailed merchandise to the United States." The petitioners contend that it would be absurd to attribute the debt forgiveness to ISCOTT because ISCOTT no longer produced the subject merchandise, as well as also to ignore subsidization because of the form of the sale, essentially elevating form over substance.

Department's Position: As discussed in Comments 1 through 3 above, we have found based on our change-in-ownership methodology that the person to whom this debt forgiveness was given, ISCOTT, is not the same person as the respondent, CIL. Moreover, we have found that no subsidy was provided to CIL as part of the change-in-ownership transaction. Therefore, we determine that no financial contribution or benefit has been provided to CIL as a result of this debt forgiveness. Thus, we need not address the merits of the above arguments.

However, we note that the petitioners' statement was incorrect that the Department determined in 1997 Trinidad and Tobago Wire Rod that this debt forgiveness was a "new" subsidy directly attributable to CIL and not to ISCOTT. As we explained in 1997 Trinidad and Tobago Wire Rod, we found that the subsidy was attributable to ISCOTT, and we calculated the benefit to CIL using the gamma privatization methodology that was in place at the time of that determination.

Comment 5: Equity Infusions into ISCOTT

Respondents' Argument: The respondents argue that the Department should revise its Preliminary Determination findings with respect to the 1986 through 1991 equity infusions made by the GOTT into ISCOTT and find that these equity infusions were consistent with the usual investment practice of private investors. The respondents argue that, in Carbon Steel Wire Rod from Trinidad and Tobago: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 49 FR 480 (January 4, 1984) ("1984 Trinidad and Tobago Wire Rod"), the Department found that payments made by the GOTT through April 1983 pursuant to Section 4.01 of the CCDA to pay CCDA lenders any debt service payments that ISCOTT failed to make were based on a commercially reasonable decision by the GOTT in 1978 to guarantee ISCOTT's bank lending. The respondents stated that the Department did not revisit this determination with respect to the pre-1983 equity infusions in 1997 Trinidad and Tobago Wire Rod.

According to the respondents, and as the respondents argued in 1997 Trinidad and Tobago Wire Rod, advances paid by the GOTT to ISCOTT pursuant to section 4.01 of the CCDA from 1986 through 1991 cannot be found to be countervailable because the advances were nothing more than the contractual fulfillment of the loan guarantee that the Department had previously found to be consistent with commercial considerations in 1984 Trinidad and Tobago Wire Rod. The respondents contend that section 771(5)(E)(i) of the Act requires the Department to determine the existence and amount of any benefit resulting from a financial contribution at the time that the financial contribution was conferred. Thus, the Department must, according to the respondents, determine the existence and amount of any benefit by reference to the time at which the GOTT entered into the CCDA, and not revise that determination each time the GOTT was required to fulfill that obligation.

The respondents contend that the Department's rejection of this argument in 1997 Trinidad and Tobago Wire Rod was based on a misinterpretation of the CCDA and of the record evidence. Specifically, in 1997 Trinidad and Tobago Wire Rod, the Department found that the GOTT was not inexorably committed to make continued payments on ISCOTT's behalf as a result of the CCDA loan guarantees, and if the GOTT had been acting as a reasonable private investor, it would have sought to minimize its losses and take steps to improve the situation instead of maintaining the status quo. First, according to the respondents, the GOTT was required to satisfy ISCOTT's loan repayment obligations no matter what actions it took with respect to the management and operation of the plant based on its CCDA commitments.

Second, the respondents argue that record evidence shows that the GOTT took precisely the steps that Department concluded in 1997 Trinidad and Tobago Wire Rod it should take in order to minimize its exposure to CCDA liability (e.g. shutting down the plant or pursuing less costly alternatives than the continued funding of ISCOTT's operations). According to the respondents, from 1986 forward, the GOTT was in nearly a perpetual state of examining its options with respect to ISCOTT, and was at all times focused on how to minimize the total amount it would be obligated to pay under the CCDA. The respondents point out that outside evaluations were

performed in order to determine the GOTT's best options, and the studies all indicated that the GOTT's loan repayment obligations were fixed in amount and could not be reduced by any course of action. The studies also indicated that closing the plant was not the best option for the GOTT to pursue. The best option according to all of the analyses was to lease the plant, which is what the GOTT did. Thus, the respondents state that the GOTT was not maintaining the status quo as the Department suggested in 1997 Trinidad and Tobago Wire Rod, and that the GOTT did all of the things the Department said the GOTT should have done in 1997 Trinidad and Tobago Wire Rod.

The respondents also argue that, with respect to shareholder advances made by the GOTT between 1986 and 1989 pursuant to section 4.02(b) of the CCDA to cover cash deficiencies faced by ISCOTT, although the GOTT's exposure to liability under this provision was not fixed (unlike the loan guarantee liability discussed above), the decision faced by the GOTT was whether it was more commercially reasonable to abandon the ISCOTT project or to continue its operations in the hope that ISCOTT would become viable. As discussed above, the respondents contend that the GOTT was in a nearly constant state of evaluating the most cost-effective means of operating ISCOTT and reducing its overall exposure to liability, which eventually lead to the lease situation. Thus, the respondents state that the GOTT, at all times, behaved like a reasonable private investor, and its actions were, at all times, supported by objective analyses.

Finally, the respondents contend that the Department should uphold is Preliminary Determination finding that infusions made subsequent to December 31, 1991 were consistent with the investment practice of private investors.

The respondents disagree with the petitioners that the ISCOTT advances made subsequent to 1989 should be treated as grants instead of equity infusions. The respondents contend that, in 1997 Trinidad and Tobago Wire Rod, the Department found these advances to be equity infusions due to the fact that the CCDA expressly contemplated that any GOTT debt service advances to ISCOTT pursuant to the CCDA would be treated as paid-up share capital, and because ISCOTT's financial statements described the GOTT advances as capital investments. The respondents state that the petitioners have provided no new evidence or argument that would warrant a re-examination of this prior determination. The respondents also state that no new information has been placed on the record that would warrant a reconsideration of the Department's determination in 1997 Trinidad and Tobago Wire Rod that ISCOTT was equityworthy after December 31, 1991.

Petitioners' Argument: The petitioners first contend that the Department should continue to find the GOTT shareholder advances made from 1986 through 1991 to be countervailable as it did in the Preliminary Determination and in 1997 Trinidad and Tobago Wire Rod based on the fact that the Department confirmed at verification that its findings in 1997 Trinidad and Tobago Wire Rod were correct and that no new information has been placed on the record with respect to these advances. The petitioners state that the respondents' arguments with respect to these advances offer no new factual information than was already on the record and simply recycle arguments that were already considered and rejected in 1997 Trinidad and Tobago Wire Rod. The

petitioners state that it is the Department's practice not to revisit a prior finding absent new factual information (see, e.g., AST - GOES and Structural Beams from Korea). The petitioners state that this practice has been upheld by the courts (see, e.g., PPG Indus. Inc. v. United States, 978 F.2d 1232, 1242 (CAFC 1992) (where the Department does not receive or discover new information that "casts substantial doubt" on its original finding, further consideration of that finding is not warranted)).

The petitioners also state that the respondents misconstrue the Department's prior findings and the relevant record evidence with respect to the 1986 through 1991 advances. According to the petitioners, the Department in both 1984 Trinidad and Tobago Wire Rod and 1997 Trinidad and Tobago Wire Rod recognized the fact that the GOTT's continuous provision of funds had to be constantly evaluated based on the company's financial position at the time the funds were advanced in order to determine if and when the GOTT stopped acting consistently with commercial considerations. Moreover, the petitioners state that the respondents' arguments that the Department's conclusion in 1997 Trinidad and Tobago Wire Rod was incorrect because (1) the GOTT was required to repay ISCOTT's loans regardless of the operation of the plant and (2) that the GOTT took the steps it needed to take in order to minimize its exposure to liability under the CCDA are belied by record evidence. The petitioners state that the respondents' arguments that the GOTT's commitments to ISCOTT were set in stone at the time of the signing of the CCDA ignore record evidence that the GOTT had the ability to change these commitments consistent with the actions of a reasonable private investor.

Secondly, the petitioners argue that information gathered at verification shows that the shareholder advances made after 1988 were actually grants and not equity infusions. Specifically, the petitioners point out that the GOTT, at verification, stated that, while the advances were treated as equity or paid-in share capital under the CCDA, "at the time the injections were made, no actual decision had been made as to what form these infusions would take because of the uncertainty related to the lease of the facilities and the possibility of a sale to CIL." GOTT officials explained that the funds were granted in "the easiest manner they could determine at the time, in the form of subventions," or grants. See GOTT Verification Report, which is on file in the Department's CRU. Thus, the petitioners state that these advances should be treated as grants with the benefit being the amount of the grant in each year from 1989 through 1993.

However, the petitioners state that, even if the Department decides that these post-1988 advances are not grants, the petitioners argue that the GOTT conceded that no separate reports were prepared subsequent to the lease regarding the 1989 through 1993 advances. The petitioners state that, because no analysis were performed in advance of providing the post-1988 funds, the advances, including 1992 and 1993, should be treated as countervailable subsidies pursuant to 19 CFR 351.507(a)(4)(ii).

Moreover, the petitioners argue that the reports that were prepared prior to the lease that were discussed by the Department in 1997 Trinidad and Tobago Wire Rod and in the Preliminary Determination were founded on the assumption that the GOTT would continue to be involved in

the continued financial stability of ISCOTT. According to the petitioners, the Department has found in past cases that the government's role can call into question the objective nature of a market study. Citing to the Final Affirmative Countervailing Duty Determination: Certain Corrosion-Resistant Carbon Steel Flat Products from New Zealand, 58 FR 37366 (July 9, 1993), the petitioners state that the Department found that a development project between the Government of New Zealand ("GONZ") and a private company was based on feasibility studies that relied upon the implementation of specific commitments by the GONZ. In this instance, the Department stated that "the studies did not provide an objective analysis of the viability of the project, based on market conditions. Absent such government commitments, it is unlikely that a private investor would have made the investment." The petitioners state that a similar situation exists in this instance that would call into question the reliability of the pre-lease reports.

The petitioners disagree with the respondents that the GOTT's advances to ISCOTT in 1992 and 1993 were not countervailable. In addition to its above arguments, the petitioners state that the GOTT's payments to ISCOTT in 1992 and 1993 were based on the GOTT's rescheduling of ISCOTT's debts and its assumption of the direct obligation of these loans according to the GOTT. Thus, the petitioners state that the GOTT was not acting as a guarantor as argued by the respondents. The petitioners state that the GOTT was apparently seeking to clean ISCOTT's balance sheet of liabilities prior to its sale, rather than being contingently liable for these obligations. Moreover, the petitioners state that, based on record information that indicates that CIL expressed an interest in purchasing ISCOTT's assets prior to 1994 but waited until the GOTT had repaid all of ISCOTT's debts to finalize the sale, the 1992 and 1993 advances were not part of any rational investment in ISCOTT. Finally, the petitioners argue that, because the respondents have repeatedly stressed that CIL was operating the ISCOTT facilities for its own profit alone, the GOTT assumed the direct liabilities of ISCOTT without any benefit in return and, thus, was not acting like a rational private investor.

Department's Position: As discussed in Comments 1 through 3 above, we have found based on our change-in-ownership methodology that the person to whom the shareholder advances were given, ISCOTT, is not the same person as the respondent, CIL. Moreover, we have found that no subsidy was provided to CIL as part of the change-in-ownership transaction. Therefore, we determine that no financial contribution or benefit has been provided to CIL as a result of these shareholder advances. Thus, we need not address the merits of the above arguments.

Comment 6: Provision of Electricity

Petitioners' Argument: The petitioners argue that the Department should reconsider its determination that the GOTT did not provide CIL with electricity for less than adequate remuneration. In measuring the adequacy of remuneration, the petitioners assert that, absent domestic and world market prices to use as comparison bases as is the case in Trinidad and Tobago, the Department must analyze whether T&TEC establishes prices based on market principles.

The petitioners argue that the PUC Cost of Service Studies used by the Department in the Preliminary Determination in evaluating electricity prices were deficient. The petitioners maintain that, for the 1996 and 1997 Cost of Service studies, there were no full audits conducted on the studies or audit reports made available to the Department during verification. The petitioners also argue that the Department failed to confirm the allocation of costs by T&TEC among its consumer billing categories. According to the petitioners, since the 2000 Cost of Service Study, a new electricity rate calculation has been established and the Regulated Industries Commission ("RIC") has replaced the PUC. The petitioners believe this demonstrates that the rates previously established by T&TEC were not bringing in adequate remuneration and were not established in accordance with market principles. Therefore, the petitioners argue that the Department should treat the alleged electricity subsidy as a recurring grant.

Respondents' Argument: The respondents argue that the rate established for CIL's electricity during the POI was sufficient to cover T&TEC's costs and earn a reasonable profit. The respondents support the Department's Preliminary Determination analysis to rely on T&TEC's costs and revenues. According to the respondents, this approach is consistent with that taken in 1997 Trinidad and Tobago Wire Rod, and is consistent with the Department's Preamble to the Regulations (see 63 FR at 65378). In 1997 Trinidad and Tobago Wire Rod, the respondents note that the Department stated that an examination of the following factors is warranted where it is only the government that provides electricity within a country: whether the government has followed a consistent rate-making policy; whether it has covered its costs; whether it has earned a reasonable rate of return; and/or whether it applied market principles. The respondents argue that the rate set for CIL's electricity customer category meets all of these benchmarks. Furthermore, according to the respondents, CIL's electricity invoices accurately reflected the rates stated in T&TEC's published summary of rates, and that CIL paid for its electricity in full. Also, the respondents argue that the GOTT's price-setting philosophy for its sales of electricity during the POI was consistent and reasonable, and in accord with the PUC Act. In regard to the petitioners' argument that the Department "did not confirm the allocation of the costs among the consumer categories," the respondents argue that those allocation methodologies are evident on the face of the 2000 Cost of Service Study. Finally, the respondents assert that the revenues earned by T&TEC, regardless of classification, adequately covered the cost of service for CIL's rate class and that the petitioners' argument otherwise is unsubstantiated.

Department's Position: We do not find the petitioners arguments to be sufficient to change our findings in the Preliminary Determination that the provision of electricity is not countervailable.

In order to find a countervailable subsidy under the Act, the Department must determine that a financial contribution is provided pursuant to section 771(5)(D) of the Act, that there is a benefit to the recipient pursuant to section 771(5)(E) of the Act, and that the program is specific pursuant to section 771(5A) of the Act. In this instance, the allegation is that the program being examined relates to the provision of a good or service for less than adequate remuneration. In examining the benefit for this type of program, section 771(5)(E) of the Act stipulates that the adequacy of remuneration with respect to a government's provision of a good or service "shall be determined in relation to prevailing market conditions for the good or service being provided or the goods

being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale."

The Department's regulations further set forth, in order of preference, the benchmarks that we will examine in determining the adequacy of remuneration for goods and services (see 19 CFR 351.511). The first preference is to compare the government price to a market-determined price stemming from actual transactions within the country. However, in the Preamble to the Department's regulations, the Department notes that, in situations where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination. See 19 CFR 351.511(a)(2)(iii) and the Preamble, 63 FR at 65378. See, also, Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 66 FR 50410 (October 3, 2001) and the accompanying Issues and Decision Memorandum in the "Programs Determined to Confer Subsidies" section.

In 1997 Trinidad and Tobago Wire Rod, the Department examined the following factors to determine whether the government price was set in accordance with market principles: whether the government followed a consistent rate making policy; whether it covered its costs; whether it has earned a reasonable rate of return in setting rates; and/or whether it applied market principles in determining its rates. See 1997 Trinidad and Tobago Wire Rod, 62 FR at 55007.

In this case, the GOTT provides electricity through T&TEC, which is wholly owned by the GOTT and is solely responsible for the transmission, distribution, and sale of electric power in Trinidad and Tobago. Therefore, there are no competitively-set, private benchmark prices in Trinidad and Tobago available for determining whether T&TEC is receiving adequate remuneration within the meaning of section 771(5)(E) of the Act. Lacking such benchmarks, the only basis we have for determining what constitutes adequate remuneration are T&TEC's costs and revenues.

As noted above, T&TEC's rates and tariffs for the sale of electricity are set by the PUC, which is an independent authority. T&TEC classifies electricity consumers into one of the following categories: residential, commercial, industrial, and street lighting. Industrial users are further classified into one of four categories depending on the voltage at which they take power and the size of the load taken. CIL is classified under Rate E (Heavy Industrial - Very Large Load). The rates and tariffs fixed by the PUC may be increased by the PUC based on claims filed by T&TEC. As part of its claim, T&TEC prepares a cost of service study that is presented to the PUC, where it is extensively reviewed by teams of economists, statisticians, and auditors. Additionally, the public is allotted opportunities to express its view on the proposed rate increases. In establishing the new rates, the PUC is required to follow the guidelines set out in the Public Utilities Act and the PUC is required by section 32 of the Public Utilities Act to ensure that the new rates will cover costs and expenses and allow for a return.

The rates in effect during the POI for Rate E users were established in July 1998 according to PUC Order No. 85 and became effective retroactively as of January 1997. The rate increase was based on the findings of the 1996 and 1997 Cost of Service Studies, which demonstrated that T&TEC was not receiving adequate remuneration for the electricity provided to Rate D3 and Rate E users. Since that rate increase, T&TEC has prepared cost of service studies in 1999 and 2000. The 1999 and 2000 Cost of Service Studies, provided on the record by the GOTT, indicate that T&TEC realized profits on its sales under the Rate E customer category. Based on the PUC's consistent rate making policy along with its mandate to set rates that will cover the costs of providing electricity plus an adequate return, we find that T&TEC has established its rates in accordance with market principles.

In regard to the petitioners' arguments about the overall profitability of T&TEC, we find this position unpersuasive as only the Rate E customer category is pertinent to this investigation. Moreover, the fact that the PUC has been replaced by the RIC and a new rate calculation methodology established since 2000 supports the Department's position that T&TEC is operating in accordance with market principles.

Therefore, as the 1999 and 2000 Cost of Service Studies indicate that T&TEC covered its costs and incurred an adequate return on the electricity sold to the Rate E customer category, we are not changing our Preliminary Determination analysis with respect to this program.

Comment 7: Petitioners' New Subsidy Allegation

Petitioners' Argument: The petitioners disagree with the Department's decision at the Preliminary Determination not to examine the petitioners' new allegation relating to the sale of ISCOTT's assets in an non-arm's-length transaction at less than fair market value. Specifically, the petitioners disagree that the Department is precluded from considering and countervailing subsidies that result directly from a change-in-ownership transaction when the Department finds that the pre- and post-sale entity are the "same person." The petitioners contend that the question of whether previously-bestowed subsidies continue to be countervailable after a change in ownership is completely different from whether new subsidies arising out of a change in ownership itself are countervailable. The petitioners argue that the Department has, in fact, in this case examined and found to be countervailable subsidies that were bestowed as part of the change-in-ownership transaction relating to the forgiveness of ISCOTT debt at the time of the sale of ISCOTT's assets.

Respondents' Argument: The respondents did not have any arguments specifically relating to this issue with the exception of those arguments addressed above in Comment 3.

Department's Position: We disagree with the petitioners. It is the Department's practice, when a change in ownership occurs and we find that the pre-sale and post-sale entities are the same "person," to not conduct an analysis of whether the transaction reflected fair value. See, e.g., "Final Results of Redetermination Pursuant to Court Remand" Acciai Speciali Terni S.p.A. v. United States, Court No. 99-06-00364, Remand Order (CIT August 14, 2000). Moreover, as

discussed above in Comment 4, the petitioners' comments with regard to debt forgiveness are moot because we have found the debt forgiveness to be non-countervailable. Finally, as discussed above in Comment 3, the petitioners' argument with respect to the fair market value of the transaction is also moot as the Department has now conducted a fair market value analysis in conjunction with its change-in-ownership analysis.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination in the Federal Register.

AGREE ____ DISAGREE ____

_____
Faryar Shirzad
Assistant Secretary for
Import Administration

_____
(Date)